

COPY

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF:)	
TRACY HARRIS,)	DOCKET NO. 06-10-372
)	
Grievant,)	
)	
v.)	DECISION AND ORDER ON
)	MOTION TO DISMISS
DEPARTMENT OF CORRECTIONS,)	
Employer/Agency.)	

BEFORE John F. Schmutz, Joseph D. Dillon, and Martha Austin, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

For the Grievant:
(no appearance)

For the Department:
Kevin Slattery
Deputy Attorney General
Delaware Dept. of Justice
820 N. French St.
Wilmington, DE 19801

NATURE OF THE PROCEEDINGS

The grievance appeal concerns the reassignment of the Grievant in 2006, who was employed for three years as a Correctional Officer at the Delaware Correctional Center, from the 7-3 shift at the Education Building to the 8-4 shift at the Security Housing Unit ("SHU"), after an adverse Step Three grievance decision. *See* Merit Rule No. 18.0.

Prior to the evidentiary hearing, the Department, through counsel, filed a Motion to Dismiss for lack of jurisdiction. Specifically, the Agency claimed that this was not a grievable matter and that the Grievant had no standing to file the grievance or to maintain an appeal to the Board.

A Legal Hearing on the Department's Motion to Dismiss was held on December 20, 2007.

The *pro se* Grievant, Tracy Harris, did not appear for the December 20th hearing. Written notification dated November 16, 2007 was sent to Ms. Harris at her address on file with the Board, concerning the scheduling of the December 20th hearing. The written notification was not returned to the Board.

In presenting its Motion to Dismiss, the Department made oral argument based upon the reasons set forth in its Motion and requested the grievance be dismissed. This is the decision of the Board on the Motion to Dismiss the appeal.

FINDINGS OF FACT

The Board finds that the Grievant's address on file with the Board was the same address as stated in the written notification dated November 16, 2007, and also finds that the notification was not returned to the Board as undeliverable. The Board further finds that the Department's Motion to Dismiss was unopposed by the Grievant.

DISCUSSION AND CONCLUSIONS

In the present case and based upon the record presented to the Board, there are two issues: 1) whether the Grievant received notice of the December 20, 2007 hearing, and 2) whether the Board has jurisdiction to consider the grievance filed with the Board on September 15, 2006.

First, the Board concludes that the Grievant had notice of the December 20, 2007 hearing. The Grievant's address on file with the Board was the same address as stated in and sent for the written notification dated November 16, 2007. There were no other records in the Board's file to indicate a change of address for the Grievant.. As such, the Board concludes that the notice, which was not returned as undeliverable, is presumed to have been received. A properly addressed, posted, and mailed notice is presumed to be received by claimant, and mere denial of receipt of notice is insufficient to rebut this presumption. *Robledo v. Stratus v. Unemployment*

Ins. Appeal Bd., 2001 WL 428684, at *2 (Del.Super.Ct. Mar. 27, 2001).

Second, the Board also concludes that it does not have jurisdiction to consider this matter. *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 654 (1973) (powers of administrative agency must be exercised in accordance with statute conferring power upon it). A classified employee's standing to maintain a grievance is limited to an alleged wrong that affects her status in her present position. 29 *Del.C.* § 5943(a). Under the facts presented here, a reassignment to a different location with the Delaware Correctional Center is not a change in status or position as contemplated by Section 5943(a). Also, based upon the record, it appears the Grievant filed her initial grievance alleging a violation of Merit Rule 2.0. However, as the Step 3 Decision indicated and the Agency argued in its Motion, the Grievant presented no evidence to show discrimination.

Therefore, by the unanimous vote of the Board hearing this matter, the Motion to Dismiss is granted and the grievance is dismissed.

ORDER

It is this 25th day of February, 2009, the Decision and Order of the Board that the Department's Motion to Dismiss is granted and the grievance appeal is dismissed.

BY ORDER OF THE BOARD:


John F. Schmutz, Member


Joseph D. Dillon, Member


Martha Austin, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

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